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February 27, 1957

His Excellency, Lane Dwinell
Governor of New Hampshire
Concord, New Hampshire

Dear Governor Dwinell:

You have inquired concerning the procedure required by the Constitution with respect to effecting nominations and appointments as this term appears in the Constitution, Part II, Articles 46 and 47. In reply I respectfully advise as follows:

Nominations and appointments of constitutional officers stand on a different footing than those applicable to action of the Governor and Council in the appointment of other officers under statutes providing for appointments by the Governor with the advice and consent of the Council or with its advice and approval. See, Opinion of the Justices, 98 N.H. 530, 532 (1953). Article 46 of the Constitution requires that all judicial officers, the Attorney General, coroners and certain other officers "shall be nominated and appointed by the governor and council; and every such nomination shall be made at least three days prior to such appointment; and no appointment shall take place, unless a majority of the council agree thereto." The Constitution further provides, in Article 47, that the Governor and Council shall have a negative on each other, both in the nominations and appointments, and this Article further requires that: "Every nomination and appointment shall be signed by the Governor and Council, and every negative shall be also signed by the Governor or Council who made the same."

From the foregoing constitutional provisions it is clear that the Governor and Council are required to join together

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in every nomination and in every appointment. If they are in opposition the power to negative prevents a nomination or appointment.

You have specifically inquired whether the nomination of William W. Keller of Laconia as Associate Justice of the Superior Court is a "nomination" within the meaning of the Constitution. In this regard you state that you placed his nomination before the Council in writing with a copy to each Councilor at the meeting of the Governor and Council on February 14 and that you then referred to Mr. Keller by name in describing his background and qualifications and indicated further that as a constitutional officer his name would have to come before the Council at its next meeting for the purpose of appointment. You state also that at this time the Council was not polled and took no vote whatever by way of affirmance or disaffirmance of your action.

I respectfully advise that in my opinion the action as stated constitutes a valid and legal nomination within the meaning of Articles 46 and 47 of the New Hampshire Constitution. Examination of precedents shows a consistent practice of appointment of justices of the peace and other judicial officers by nomination on one Governor and Council day and appointment on another. A nomination is made when the Governor places before the Council a name as nominee for a judicial position unless the Council then by affirmative action on its part shall exercise a negative. It was and always must be by constitutional provision open to the Council to negative any nomination by the Governor at the time it is made, and vice versa.

In the absence of the exercise of a negative, which requires polling of the Council and a vote just as would a nomination from that source, it is my opinion that the Council acquiesced and concurred in the nomination and that a nomination under such circumstances is a nomination by the Governor and Council within the meaning of Articles 46 and 47 of Part II of the New Hampshire Constitution.

In this regard it is believed of some importance to observe that in the event any objection to a nominee for constitu-

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tional office should be brought to the attention of the Governor or Council between the time of nomination and the date of the meeting for purposes of appointment (which cannot be earlier than three days after the nomination) there is then ample occasion and opportunity for a vote of negative on the confirmation. Stated simply -- in the case of the nomination of any constitutional officer, his appointment presents the opportunity to negative on the part of either the Governor or the Council and the exercise of such negative shall be made in the form prescribed in article 47 in the same manner as nominations. If a majority of the full membership of the Council are in opposition to any nominee, he cannot receive appointment and in the case of constitutional officers such opposition may be expressed either at the time of nomination or at the time of appointment.

Respectfully submitted

Louis C. Wyman
Attorney General

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